CURRENT DEVELOPMENTS

THE 2015 JUDICIAL ACTIVITY OF THE INTERNATIONAL COURT OF JUSTICE

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The International Court of Justice (Court or ICJ) delivered three judgments in 2015. The first, delivered on 3 February, determines claims of genocide made by Croatia and Serbia against each other. The second, delivered on 24 September, addresses Chile's preliminary objections in a case brought by Bolivia claiming violation of an obligation to negotiate in good faith in order to secure Bolivia's sovereign access to the Pacific. The third, delivered on 16 December, concerns the joined cases brought by Costa Rica and Nicaragua against each other, alleging territorial violations and transboundary environmental harms. This review highlights notable points of interest in the judgments, and draws attention to particular insights and critiques afforded by the several individual opinions that accompany each judgment.

I. THE COURT'S JUDICIAL ACTIVITY

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)

The judgment in Croatia v. Serbia marks the end of a long list of ICJ cases arising from violence, displacement, and other issues in the disintegration and eventual dissolution of the Socialist Federal Republic of Yugoslavia (SFRY).[1] This case concerned claims of genocide made by each party against the other. Croatia instituted an application in 1999, invoking the jurisdictional clause of the Genocide Convention, Article IX.[2] It alleged that Serbia was responsible for several violations of that Convention, including commission, conspiracy, attempt, and complicity in genocide against Croats, and failures to prevent and punish genocide.[3] Croatia's claims focused on the period between mid-1991 and mid-1992. Serbia advanced its counter-claim in December 2009, following the decision on its preliminary objections.[4] Serbia alleged that Croatia had committed, conspired in, and failed to prevent

[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits (Int'l Ct. Justice, Feb. 3, 2015) [hereinafter Application of Genocide Convention]. All the materials of the Court cited in this report are available on its website, www.icj-cij.org.
[2] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277 (entered into force Jan. 12, 1951).
[3] Application Instituting Proceedings (Croatia v. Yugoslavia), para. 36 (Int'l Ct. Justice, July 2, 1999).
[4] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, 2008 ICJ REP. 412 (Nov. 18) [hereinafter Application of Genocide Convention, Preliminary Objections].

and punish acts of genocide against Serbs living in the Krajina region of Croatia in and around August 1995.[5] The Court in 2015 dismissed both sets of claims on the merits.

The factual context for the claims is well known. In the early 1990s, following economic crises and ethnic tensions in the SFRY, the republics of Croatia, Slovenia, Macedonia, and Bosnia and Herzegovina all declared independence. The remaining republics, Serbia and Montenegro, calling themselves the Federal Republic of Yugoslavia (FRY), adopted a declaration on 27 April 1992, claiming that the FRY, as the continuator of the 'international legal and political personality' of the SFRY, would 'strictly abide' by all the international commitments assumed by the SFRY, and would remain bound 'by all obligations to international organizations and institutions whose member it is…'[6] The Yugoslav Permanent Mission to the United Nations sent a Note to the UN Secretary General on the same date, reiterating that as the continuator of the SFRY, the FRY would 'continue to fulfil all the rights conferred to, and obligations assumed by, the [SFRY] in international relations, including its membership in all international organizations and participation in international treaties….'[7] The FRY's claim of continuity with the SFRY was rejected in the UN, after a period of strategic ambiguity; the General Assembly and Security Council agreeing that it could not avail of the SFRY's membership. However, the FRY only relinquished its claim in November 2000, when it agreed to be admitted to UN membership as a new state (successor rather than continuator to the SFRY). In the intervening period, the FRY's status was regarded as *sui generis*,[8] and the Court's holdings in its respect were 'not free from legal difficulties'.[9] This is seen, for example, in the legal consequences attached to its declaration and Note of 27 April 1992: without accepting its claim of continuity, the Court held it bound by the SFRY's treaties from that date, including the Genocide Convention (notwithstanding its formal accession to that treaty in 2001).[10] The FRY changed its name to Serbia and Montenegro in 2003. In 2006, the two units split, with Serbia alone continuing the personality

[5] Application of the Genocide Convention, Counter Memorial of Serbia, Vol I., paras. 29, 1096-1476 (Int'l Ct. Justice, Dec. 1, 2009).
[6] Declaration of the Representatives of the People of the Republic of Serbia and the Republic of Montenegro (Apr. 27, 1992), UN Doc. A/46/915, Ann. II, May 7, 1992.
[7] Noted dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary General, UN Doc. A/46/915, Ann. I, May 7, 1992.
[8] Application of the Genocide Convention, *supra* note 1, Decl. Xue, J., para. 9.
[9] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, 1993 ICJ REP. 3, para. 18 (Apr. 8). See also Application of the Genocide Convention, *supra* note 1, Sep. Op. Skotnikov, J., para. 8.
[10] Application of the Genocide Convention, Preliminary Objections, *supra* note 4, para. 111.

of the existing state. The Court decided that the new state of Montenegro was not a party to the present case.[11]

While Serbia's statehood was in this process of legal clarification, the situation on the ground there and elsewhere in the former Yugoslavia was marked by outbursts of ethnic conflict. Relevant to the present case, in spring 1991 conflict broke out in the republic of Croatia, between Croats who sought to form an independent state, and Serbs who sought attachment with the republic of Serbia. The Yugoslav National Army (JNA) intervened later that year, officially to separate the two, but allegedly in support of the Serbs.[12] The first phase of the conflict, from 1991 to summer 1992 saw the Serbs, allegedly aided by JNA, establish territorial control over a third of Croatian territory, including by forcibly displacing Croats. In summer 1995, Croatia carried out Operation Storm, recovering the same occupied territory, and removing Serbs from it. The two sets of claims related to the violence inflicted by the victorious side of each phase.

Perhaps the most debatable feature of the present judgment is the Court's first finding: dismissing Serbia's preliminary objection that the Court's jurisdiction did not extend to events prior to 27 April 1992, i.e. before the FRY had declared its existence or intention to be bound by the SFRY's treaties. The Court had joined this objection to the merits stage.

Croatia advanced several arguments against this objection. It firstly argued that because the Genocide Convention had been in force throughout the territory of the former SFRY prior to 27 April 1992, its provisions could be retroactively applied to the FRY, which—*in statu nascendi* by the summer of 1991—emerged from the SFRY's dissolution and took control of the SFRY's organs. It further argued that under Article 10(2) of the Articles on State Responsibility (ASR),[13] the acts of the JNA, and various Serb groups could be attributed to Serbia. Article 10(2) provides:

> The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

[11] *Id*., para. 34.
[12] Application of the Genocide Convention, *supra* note 1, para. 66.
[13] Articles on the Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No.10, at 43, UN Doc. A/56/10 (2001).

The Court rightly dismissed these two arguments. It found that the Genocide Convention did not have retroactive effect, and could not be applied to Serbia before it had declared itself bound. Serbia was not responsible under the Convention either for commission or for failure to prevent commission of genocide prior to 27 April 1992.[14] Moreover, it was not responsible for the failure to punish acts of genocide committed prior to 27 April 1992. Croatia had argued that responsibility for this last omission followed from the text of the Convention—which did not limit the temporal scope of the duty to punish—supported by the existing prohibition of genocide in customary international law, the *erga omnes* character of the obligation to prevent and punish genocide, and the Convention's own object of avoiding impunity for genocide.[15] The Court, however, found that neither the text of the Convention nor its negotiating history suggested any intention to obligate states to enact retroactive legislation necessary 'to punish acts of genocide committed in the past', before they had become bound by its terms.[16]

Further, the Court held that there was no point in pursuing the argument on attribution, for even if the acts of the JNA and other Serb groups were found attributable to the FRY in accordance with Article 10(2), they could not constitute a violation of the Genocide Convention by the FRY at a time when it was not a party. Prior to 27 April 1992, there could be no question of a dispute relating to Serbia's fulfilment of the Convention, such as to engage Article IX.

The case may have ended at this point, had the Court not decided to engage Croatia's third argument, introduced in oral proceedings, of Serbia's responsibility by succession.[17] Croatia argued that as acts prior to 27 April 1992 were attributable to the SFRY and breached its obligations under the Genocide Convention, when Serbia succeeded to those obligations on 27 April 1992 it also succeeded to the responsibility that had been incurred for their violation. Croatia invoked both the general international law on state succession—particularly the *Lighthouses Arbitration*,[18] in which a tribunal had held that the responsibility of a State might be transferred to a successor if that was appropriate on the facts—and the FRY's own declaration and Note.

[14] Serbia's obligations under the customary international law on genocide were not before the Court: Application of the Genocide Convention, *supra* note 1, paras. 87-88.
[15] Verbatim Record, Application of the Genocide Convention, ICJ Doc. CR 2014/12, at 44-47 (Mar. 7, 2014).
[16] Application of the Genocide Convention, *supra* note 1, paras. 96-100.
[17] Verbatim Record, Application of the Genocide Convention, ICJ Doc. CR 2014/21, at 20-22 (Mar. 21, 2014).
[18] Lighthouses Arbitration between France and Greece, Claims No. 11 and 4, July 24, 1956, 23 ILR 81.

The Court does not permit applicants to insert new claims at oral hearings if they transform the subject-matter of the dispute.[19] However, it held that Croatia's new argument did not amount to a new claim, and merely supported its existing claims on Serbia's responsibility and the Court's jurisdiction. The Court also decided that Article IX of the Genocide Convention comprehended succession as a possible mode of responsibility. Article IX states

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the [ICJ] at the request of any of the parties to the dispute.

The Court noted that this text 'speaks generally of the responsibility of a State, and contains no limitation regarding the manner in which that responsibility might be engaged'.[20] Whether, and in what manner responsibility might be incurred fell to be determined under the rules of general international law, including on interpretation, responsibility, and—now the Court added—state succession. In its view, the applicability of state succession to Serbia in respect of allegations of genocide, and even the existence of a rule of succession to responsibility were questions relating to the merits of the claims. They would need to be examined only if it were established that acts amounting to genocide had been committed, and were attributable to the SFRY. Deciding to address these questions in this order, the Court dismissed Serbia's preliminary objections in relation to pre- 27 April 1992 events.

The Court's partial adoption of the succession thesis, finding that the text of Article IX could include state responsibility by succession if a rule of succession to responsibility were established in international law, but bracketing the question of whether it was indeed so established, was opposed by several judges.[21] Three criticisms are especially noteworthy. Firstly, there is no self-evident doctrine of succession in respect of state responsibility in international law. To quote the most recent edition of a popular textbook, state succession 'is an area of uncertainty and controversy … it is possible to take the view that not many settled rules have yet emerged.'[22] Succession to state responsibility is a particularly elusive concept, finding no mention in the codified rules either of treaty succession or of state responsibility.[23]

[19] Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua v. Honduras), 2007 ICJ REP. 695, para. 108 (Oct. 8); see also Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, 1999 ICJ REP. 139, para. 44 (June 2).
[20] Application of the Genocide Convention, *supra* note 1, para. 114.
[21] President Tomka, Judges Owada, Skotnikov, Xue, Sebutinde, and Judge *ad hoc* Kreća.
[22] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 424 (8th edn., 2012)
[23] Application of the Genocide Convention, *supra* note 1, Decl. Xue, J., para. 23.

The Court's own best example of the *Lighthouses Arbitration* turned on Greece's adoption of the unlawful act of its predecessor state.[24] In other cases too, the assumption of responsibility by the successor state has constituted the material factor.[25] A doctrine of succession to responsibility may well be desirable to close accountability gaps arising from the actions of a formally extinct state (as Croatia posited). But that is different from asserting that it exists. The Court should have discussed the evidence in support of this doctrine, and its applicability in 1992, at the date of Serbia's succession to the SFRY.[26] Its decision to postpone consideration of these issues until after a determination of the merits of the genocide claims may have served the cause of judicial economy, but—coupled with its omission to return to them—means that it based its jurisdiction on a doctrine of dubious status, which it ultimately failed to clarify.

Secondly, the Court erred in placing succession at par with attribution as means of incurring responsibility under the Genocide Convention. In fact, as President Tomka shows by reference to the Convention's text and *travaux préparatoires*, it does not contemplate responsibility by succession.[27] The Court contented itself with noting the general wording of Article IX. But its summary disposal of the point, without the careful analysis of text and negotiating history that it undertook on other points, does not sufficiently answer President Tomka's challenge that a limitation as to responsibility by succession is indicated in both.

Thirdly, the Court relied on the doctrine of succession to overcome the fact that part of its evaluation on the merits concerned the conduct of a *third* state, the former SFRY, which was not a party to the dispute. There is no provision for such an adjudication in Article IX. Its language should not be taken to suggest that states may submit disputes relating to the interpretation, application or fulfilment of the Convention by a third state;[28] such an interpretation could open the way to the adjudication of a state's responsibility without its consent. The Court side-stepped the point by arguing the non-applicability of the *Monetary Gold* principle to the case of a state which has ceased to exist.[29] (And on merits it did not find SFRY responsible for genocide). But it did not consider the incongruity of a situation in which it may have found for the SFRY's responsibility, but not for the FRY's succession to

[24] CRAWFORD, *supra* note 22, at 442.
[25] See Patrick Dumberry, *The Controversial Issue of State Succession to International Responsibility Revisited in Light of Recent State Practice*, 2006 GER. Y.B. INT'L L. 413.
[26] Application of the Genocide Convention, *supra* note 1, Sep. Op. Skotnikov, J., para. 4.
[27] *Id*., Sep. Op. Tomka, J., paras. 8-24.
[28] *Id*., Sep. Op. Tomka J., paras. 21-24.
[29] *Id*., para. 116. See Monetary Gold Removed from Rome in 1943 (Italy v. France, UK and USA), Preliminary Question, 1954 ICJ REP. 19 (June 15).

the same. There, in effect, it would have ruled on the conduct of a third party, without proving the necessary link with the responsibility of the respondent.

Moreover, a finding in favour of Serbia's responsibility by succession could have implications for the other successor states to the SFRY.[30] There was no prior understanding that Serbia would be the sole successor to the SFRY's responsibility; indeed, by an 'Agreement on Succession Issues', the former Yugoslavian republics had deferred such questions to a joint committee.[31] Would not then the *Monetary Gold* principle apply – or at least bear consideration as to its application – with respect to the other successor states?

A number of judges noted that Croatia's third argument, although framed in terms of state succession, implicitly relied upon the continuity between the FRY and the SFRY, which Croatia had strongly rejected in the past.[32] And the manner of the Court's uptake of this argument, without a full discussion of the above issues relating to responsibility by succession, does not dispel the perception that questions of Serbia's status were once again treated with greater consideration to political expediency than legal principle.

Fortunately, this judgment brings that line of cases to a close.[33] Moreover, the facts are so particular that the Court's application of Article IX is unlikely to have much impact on other cases concerning the scope of that provision.[34] Rather – and hearteningly – the judgment's impact might be that of prompting greater reflection on the status in international law of a doctrine of succession to state responsibility, leading eventually to clarification of the same.

Turning to the merits claims, the Court found that although some of the acts cited by each party satisfied the *actus reus* of genocide as defined in the Genocide Convention, the requirement of an accompanying mental intent, or *dolus specialis*, was not satisfied. In doing so it added little to its previous jurisprudence. The parties raised specific contentions with respect to the criteria for evaluating *actus reus* and *dolus specialis*, and the Court settled these by reiterating its approach in the *Bosnian Genocide* case.[35] Those portions of the judgment make useful reading mainly as a succinct account of the Court's interpretation of the concept of genocide provided in the Genocide Convention. Perhaps it went a step beyond previous

[30] *Id*., Sep. Op. Tomka, J., para. 32.
[31] Annex F, Agreement on Succession Issues, June 29, 2001, 2262 UNTS 251 (entered into force June 2, 2004).
[32] Application of the Genocide Convention, *supra* note 1, Sep. Op. Tomka, J., para. 25; *id*., Decl. Xue, J., para. 15; *id*., Sep. Op. Sebutinde, J., para. 13.
[33] See *id*., Sep. Op. Skotnikov, J., para. 9.
[34] See *id*., Sep. Op. Tomka, J., para. 33; but see also *id*., Decl. Xue, J., para. 26.
[35] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, 2007 ICJ REP. 43 (Feb. 26).

jurisprudence in its comments on disappeared persons. The Court accepted Croatia's argument that 'the psychological pain suffered by the relatives of individuals who have disappeared in the context of an alleged genocide, as a result of the persistent refusal of the competent authorities to provide the information in their possession which would enable these relatives to establish with certainty whether and how the persons concerned died', could constitute such serious mental harm as to as to contribute to the physical or biological destruction of the group, thereby falling within the definition of genocide.[36] While it did not find such a degree of suffering established on the facts, it encouraged both States to cooperate and use all available measures 'in order that the … fate of missing persons [on both sides] can be settled as quickly as possible.'[37]

Another helpful point was the clarification that, in the absence of a specific plan, the Court will infer *dolus specialis* if that is the only *reasonable* inference to be drawn from a pattern of conduct.[38] In the *Bosnian Genocide* case the Court had appeared to suggest that it would infer genocide if that were the only *possible* inference to be drawn.[39] However the Court here clarified that the change of language did not indicate a change of standard, for the notion of reasonableness was implicit in that previous judgment.

The Court further offered an interesting discussion on the burden, standard and methods of proof. Much of this was again a reiteration of previous jurisprudence. However, perhaps catalysed by specific questions on the probative weight to be given to different categories of witness evidence, and on the admissibility of unsigned statements in Croatian courts, asked by Judges Bhandari and Greenwood,[40] the judgment offered a helpful elaboration of how the Court treats different types of witness testimony.[41] Whether the Court faithfully applied its stated standard of proof is a different matter—one raised by Judge Donoghue in her separate opinion.[42] Nevertheless, greater clarity from the Court on such points is to be welcomed.

The case provided further opportunity for the Court to articulate its relationship with the International Criminal Tribunal for the former Yugoslavia (ICTY) (and by extension other such institutions). The Court affirmed that it regarded the ICTY's factual findings as 'highly

[36] Application of the Genocide Convention, *supra* note 1, paras. 160, 356.
[37] *Id*., paras 359, 523.
[38] *Id*., para. 148.
[39] Bosnian Genocide, *supra* note 35, para. 373.
[40] Verbatim Records, Application of the Genocide Convention, ICJ Doc. CR 2014/12, at 10 (Mar. 7, 2014); and ICJ Doc. CR 2014/20, at 67 (Mar. 20, 2014).
[41] Application of the Genocide Convention, *supra* note 1, paras. 180-199.
[42] *Id*., Decl. Donoghue, J., para. 9.

persuasive' and gave due weight to the Tribunal's evaluations based on the facts, 'for instance about the existence of the required intent'.[43] Nevertheless, some judges, and Serbia, suggested interesting variations on the use that the Court might make of the ICTY's work.

Judge Sebutinde questioned the Court's attaching of significance to the ICTY Prosecutor's decision to exclude or withdraw charges of genocide from an indictment.[44] She pointed out that such decisions were discretionary, and could be made for many reasons other than the probity of the charges. Moreover, the lack of proceedings in respect of the criminal responsibility of individuals could not be determinative of state responsibility. These are good points, and although the absence of genocide charges at the ICTY was only one of the factors relied upon by the Court, there may be an argument for it to reconsider whether and in what circumstances it will attach weight to prosecutorial discretion exercised at international criminal tribunals.

Judge Skotnikov made almost the opposite suggestion that the Court, being ill-equipped to make factual findings, should wholly rely on relevant proceedings at the ICTY.[45] That is, the factual determination should be entirely outsourced, given a suitable international penal tribunal, leaving to the Court only such questions as attribution and state responsibility. While the suggestion is attractive in that it may reduce the Court's burden, Judge Sebutinde's arguments would stand against such an approach. *A fortiori* if the suggestion made by Judge Gaja—that state responsibility for genocide should be assessed by reference to different standards than individual criminal responsibility—carries weight.[46] Judge Gaja's suggestion departs from the approach taken by the Court,[47] but rightly calls attention to the difference in the focus of the two institutions.

The most interesting suggestion came from Serbia, which argued that the Court need not accord greater weight to the findings of an ICTY Appeals Chamber than a Trial Chamber. It claimed that the judges of the former chamber, appointed at random and varying from case to case, could not claim greater experience or authority than those of the latter. Thus, rather than regarding an Appeals Chamber's overruling of a Trial Chamber as conclusive, the Court

[43] *Id*., para. 182.
[44] *Id*., Sep. Op. Sebutinde, J., paras. 16-21.
[45] *Id*., Sep. Op. Skotnikov, J., para. 14.
[46] *Id*., Sep. Op. Gaja, J., paras. 1-5.
[47] Judge Rosalyn Higgins, then President of the ICJ, clarified that Court's standard of proof for genocide was not higher or lower than that applied by the ICTY, '[it was] simply a comparable standard, but employing terminology more appropriate to a civil, international law case': Statement to the Sixth Committee of the General Assembly (Nov. 2, 2007), UN GAOR, 62nd Sess., Sixth Committee, 23rd mtg, para. 94, UN Doc. A/C.6/62/SR.23 (Dec. 6, 2007).

should form its own view of the persuasiveness of the arguments accepted by each.[48] The background to Serbia's argument was the ICTY's judgments in the *Gotovina* case, in which the Trial Chamber had unanimously convicted two Croatian Generals of participation in a joint criminal enterprise to commit crimes that constituted the *actus reus* of genocide.[49] The Appeals Chamber had overturned these convictions by a majority of three to two.[50] Serbia contended that the Court should take into account the fact that, counting across both Chambers, a greater number of judges were convinced of the guilt of the Croatian Generals. The Court rightly dismissed these arguments, noting that it was not for it to pronounce on the manner in which the Appeals Chambers were constituted and that it was bound to respect the hierarchy between the two chambers. To adopt Serbia's suggestion would have been to overlook the judicial form of the ICTY altogether, a lapse of judicial comity on the part of the Court.

A final thought to close with: a layperson reading the case may be struck by the parties' ready utilization of their own awful deeds and intentions as arguments in favour of their case. Acknowledging claims of forced displacement and ethnic cleansing, they argued that, committed only in order to gain control over the territory, those acts did not disclose a genocidal intent.[51] This was a sound argument in a context where the Court's jurisdiction extended only to violations of the Genocide Convention. Nevertheless not only laypersons, but also lawyers must feel discomfort at the jurisdictional constraints that necessitate such fragmentary adjudications of responsibility as give bite to such arguments. That, indeed, is the message in the concluding paragraphs of both the judgment and the President's separate opinion.[52]

Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)

The second judgment of 2015 concerns Chile's preliminary objection to jurisdiction in the case brought against it by Bolivia.[53] Bolivia's application, instituted in April 2013, asked the

[48] Verbatim Record, Application of the Genocide Convention, ICJ Doc. CR 2014/18, at 44-47 (Mar. 14, 2014).
[49] Prosecutor v. Gotovina et al., Trial Judgment, IT-06-90-T (Apr. 15, 2011).
[50] Prosecutor v. Gotovina et al., Appeals Chamber Judgment, IT-06-90-A (Nov. 16, 2012).
[51] Application of the Genocide Convention, *supra* note 1, paras. 412-437 (esp. 435), 505, 514; see also Application of the Genocide Convention, Counter Memorial of Serbia, Vol I., paras. 55-58, 975-977 (Int'l Ct. Justice, Dec. 1, 2009); Additional Pleading of Croatia, Vol I., paras. 4.31-4.36 (Int'l Ct. Justice, Aug. 30, 2012).
[52] Judgment, *id*., para. 523; *id*., Sep. Op. Tomka, J., paras. 34-35.
[53] Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objections, paras. 15-17, 19 (Int'l Ct. Justice, Sep. 24, 2015) [hereinafter Obligation to Negotiate].

Court to find that Chile had violated an obligation 'to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean.'[54] It requested the Court to order Chile to perform this obligation 'in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean.'[55] The application invoked Article XXXI of the Pact of Bogotá[56] as the basis for the Court's jurisdiction. Article XXXI provides for compulsory jurisdiction of the Court in disputes concerning treaty interpretation, questions of international law, breaches of international obligation, and reparation. Chile's preliminary objection, however, referred the Court to Article VI of the same Pact,[57] which excludes recourse to Article XXXI in 'matters already settled by arrangement between the parties, or … governed by agreements … in force on the date of the conclusion of the present Treaty.' Chile contended that Bolivia's request, effectively asking the Court to order Chile to make a specific territorial disposition, concerned a matter that had already been settled by a bilateral treaty concluded between the two states in 1904.[58] Bolivia objected to this characterization of the dispute before the Court.

The factual background to the application may briefly be reprised. Bolivia, land-locked between Brazil, Chile, Paraguay and Peru, once had a coastline along the Pacific Ocean, which it lost following a war with Chile in the late 19th century. In 1904, the two states signed a Treaty of Peace and Friendship, formalizing a comprehensive territorial settlement, under which Bolivia's coastal territory became Chilean, while Bolivia was granted a right of commercial transit to Chilean ports.[59] Bolivia remained desirous of regaining a sovereign access to the Pacific Ocean, and claims that for many years, Chile showed willingness to negotiate terms by which it could be achieved: Chile specifically committed itself 'through agreements, diplomatic practice and a series of declarations attributable to its highest-level representatives, to negotiate a sovereign access to the sea for Bolivia,'[60] but retreated from this commitment in February 2011, on the basis that 'Bolivia lacks any legal basis to access the Pacific through territories appertaining to Chile'.[61] Bolivia claimed that its application was not concerned with the terms of the 1904 treaty, but with Chile's actions thereafter that

[54] Application Instituting Proceedings (Bolivia v. Chile), para. 1 (Int'l Ct. Justice, Apr. 24, 2013).
[55] *Id.*, para. 32
[56] American Treaty on Pacific Settlement, Apr. 30, 1948, 30 UNTS 449 (entered into force June 5, 1949).
[57] Obligation to Negotiate, Preliminary Objection of Chile, Vol I., para. 1.1 (Int'l Ct. Justice, July 15, 2014).
[58] Treaty of Peace and Friendship, Oct. 20, 1904 (entered into force Mar. 10, 1905).
[59] *Id.*, Arts. II, VI and VII.
[60] Application Instituting Proceedings (Bolivia v. Chile), *supra* note 54, paras. 15-26, 31.
[61] *Id.*, paras. 27-30.

gave rise to an obligation to negotiate in good faith with Bolivia in order to secure to it a sovereign access to the sea.

The Court considered the main issue in contention was the appropriate characterization of the dispute: was it merely concerned with Chile's alleged obligation to negotiate, as Bolivia contended; or did it seek a finding that Chile was obliged to agree to a particular territorial outcome, as Chile contended? Once it settled this question, it could determine whether or not the dispute was a matter excluded by Article VI of the Pact of Bogotá.

Thus addressing the proper characterization of the dispute first, the Court found that Bolivia's application merely concerned the existence of an obligation upon Chile to negotiate with Bolivia. It dismissed Chile's argument that the relief sought by Bolivia entailed a finding not only of an obligation of *conduct* on part of Chile, but also an obligation of *result*.[62] Chile had argued that Bolivia had presented its claims in terms that suggested that a cession of territory by Chile was already a given; only the details—how much territory, and where—remained to be negotiated.[63] And this, it had insisted, was contrary to the 1904 Treaty which had finalised the territorial rights of both states; Bolivia could not reopen that discussion via an approach to the Court under the Pact of Bogotá.[64] The Court, however, considered that it would not be called upon to predetermine the outcome of a negotiation even if it were to find for Chile's obligation to negotiate. It described the subject-matter of the dispute as being 'whether Chile is obligated to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean, and, if such an obligation exists, whether Chile has breached it.'[65] It found that the 1904 treaty did not exclude the Court's jurisdiction.

The Court's description of the subject-matter of the dispute subtly rewords the relief sought in Bolivia's application, which had been for a declaration that Chile had (breached) the obligation to negotiate '*in order to reach an agreement* granting Bolivia a fully sovereign access to the Pacific Ocean' (suggesting an obligation of result).[66] The formulation in the judgment may be read as signifying that the declaration sought was simply that Chile was obligated to negotiate in good faith *the question of* Bolivia's sovereign access to the Pacific

[62] A distinction highlighted in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, para. 99 (July 8) [hereinafter Legality of Nuclear Weapons].
[63] Chile clarified this understanding in response to a question asked by Judge Owada: Obligation to Negotiate, Written reply of Chile to the question put by Judge Owada (Int'l Ct. Justice, May 13, 2015).
[64] Obligation to Negotiate, Preliminary Objection of Chile, Vol I., para. 3.19 (Int'l Ct. Justice, July 15, 2014).
[65] Obligation to Negotiate, *supra* note 53, para. 34.
[66] Application Instituting Proceedings (Bolivia v. Chile), *supra* note 54, para. 1 (emphasis added).

Ocean. That is, an obligation of conduct. The Court here was perhaps influenced by Bolivia's own implicit reformulation of its claim in these terms in the oral proceedings.[67]

The question that follows is whether by this characterization, the Court has implicitly limited its own hand as to its possible findings on the merits. That is, is it now precluded from finding that the content of any obligation to negotiate on Chile's part includes the obligation to achieve a specific result? This is an important point, for as the Court notes, at the merits stage Bolivia will adduce evidence of Chilean practice that establishes its duty to negotiate.[68] It is plausible that Bolivia will argue that this practice further evinces a recognition of the duty to provide for a certain outcome—Bolivia's sovereign access. In fact, Bolivia asserted that the existence *and* specific content of the obligation to negotiate were matters to be determined by the Court.[69] Has the Court restricted itself only to determining the former?

Probably not. The judgment avoids accepting Chile's contention that the 1904 treaty is the final word on the territorial rights and obligations of the two states. It simply finds that there is no occasion for it to examine that contention because the subject matter of the dispute is different. It emphasizes this in responding to Bolivia's alternative argument that such a contention refutes Bolivia's case on the merits, 'and thus [does] not possess an exclusively preliminary character'.[70] Ordinarily, considerations of judicial economy would imply that having accepted Bolivia's principal argument, the Court need not address the alternative. Here, though, by doing so it reinforces that it has not spoken on the merits of Chile's contention.

Nevertheless, the Court has taken a convoluted route to settling the preliminary objection. Judge Gaja outlines a better approach, which would have been to find that Bolivia's application articulates the possibility that a matter once considered settled by the 1904 Treaty was *unsettled* by subsequent practice occurring between 1905 and the conclusion of the Bogotá Protocol, and if so, was not excluded by Article VI of that Protocol.[71] Whether these claims carry weight—that is, the matter was in fact unsettled, and to what extent—were issues bearing on the merits. Chile's objection, therefore, lacked an exclusively preliminary character, and would be addressed alongside the merits. A simple order on joinder,

[67] Judge *ad hoc* Arbour makes the point about Bolivia reformulating its claim: Obligation to Negotiate, *supra* note 53, Diss. Op. Arbour, J. *ad hoc*, paras. 13-14.
[68] Obligation to Negotiate, *supra* note 53, para. 33.
[69] Obligation to Negotiate, Bolivia's response to the question of Judge Owada (Int'l Ct Justice, May 13, 2015).
[70] Obligation to Negotiate, *supra* note 53, para. 52.
[71] *Id.*, Diss. Op. Gaja, J.

recommended in a number of individual opinions,[72] would not only have had the charm of brevity, but also would have been in keeping with the likely tenor of the Court's approach at the merits stage, where it will presumably evaluate the 1904 Treaty alongside other practice to determine the existence and content of Chile's obligation to negotiate.

A final point on the likely scope of the merits arguments. Bolivia claims it will prove that 'beyond its general obligations under international law, Chile has committed itself, more specifically' to negotiate a sovereign access for Bolivia.[73] Implicit here is the assertion that international law also imposes a general obligation to negotiate, binding upon Chile. Bolivia has not clarified the basis for this assertion; but if proved, it could avoid all difficulties of establishing Chile's specific obligation. Is there a legal basis for such an obligation? There is no doctrine in the context of negotiating *sovereign* access (if that implies territorial control) that this author can readily call to mind.[74] Eyal Benvenisti offers the interesting observation—applying the idea of sovereignty as trusteeship—that '[a] coastal state … must allow access to a landlocked neighbor if such access entails no harm to itself (for example, a one-time emergency flight over its airspace, or even a tunnel below its territory).'[75] However, although Benvenisti has linked this argument to Bolivia's claim against Chile, he does not refer to a duty to negotiate cession of territory.[76] His measured tone, referring only to flight or tunnelling underground, rather confirms that under general international law Bolivia's best claim would be for negotiation of the sort of transit rights that it already enjoys by arrangement with Chile.

Proving Chile's specific obligation to negotiate an enhanced access thus appears unavoidable for Bolivia, and indicates the probable focus of its merits arguments. For, securing a tract of

[72] Judge Cançado Trinidade and Judge *ad hoc* Arbour also recommended this approach.
[73] Application Instituting Proceedings (Bolivia v. Chile), *supra* note 54, para. 31.
[74] The duty to negotiate transit does have a legal basis: see Art. 125, UN Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3 (entered into force Nov. 16, 1994). Bolivia, presumably, wants more than the right of transit. The Court has occasionally inferred an obligation to negotiate from the rights and obligations of states in specific contexts, e.g. North Sea Continental Shelf (FRG/Netherlands and FRG/Denmark), 1969 ICJ REP. 3, para. 85 (Feb. 20); Fisheries Jurisdiction (UK v. Iceland), Merits, 1974 ICJ REP. 3, paras. 74-75. The latter case, highlighting as a material point Iceland's exceptional dependence upon a particular use of the sea, might even suggest a weak analogy, but, given that even the UN Convention only recognises a right of transit for a land-locked state, it is unlikely to support a claim that Chile is under a general duty to negotiate a sovereign access to the sea.
[75] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AJIL 295, 320 (2013).
[76] Eyal Benvenisti, Landlocked Bolivia Takes Chile to the International Court of Justice Seeking Access to the Pacific Ocean, GlobalTrust Blog (May 23, 2013), at globaltrust.tau.ac.il/landlocked-bolivia-takes-chile-to-the-international-court-of-justice-seeking-access-to-the-pacific-ocean/.

territory is surely the motivation underlying its application, though it may have disavowed this to win at the stage of preliminary objections.

Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica)

The Court's third judgment involved a frequent litigant, Nicaragua. In this instance, however, the joined cases between Nicaragua and Costa Rica did not serve as the occasion for a significant pronouncement on legal doctrine or principle. The disputes, which included claims of territorial infringement and transboundary environmental harm on both sides, mainly turned on the facts. The Court found in favour of Costa Rica's claim of sovereignty over a disputed territory, and its violation by Nicaragua; and it found in favour of Nicaragua's claim that Costa Rica failed to carry out a necessary environmental impact assessment (EIA).[77] It dismissed Nicaragua's claim of territorial infringement by Costa Rica, and Costa Rica's claim that Nicaragua had not carried out a necessary EIA. The Court's (perhaps excessive) regard for judicial economy led it to leave unexamined several other claims. The only other findings were of Nicaragua's breaches of provisional measures, and of Costa Rica's navigation rights.

Given the complex factual backdrop to the joined cases, it may be helpful to first outline the facts together with the claims and findings, and then discuss some important points. Costa Rica's claims against Nicaragua concerned its activities relating to the San Juan River.[78] The river's southern bank constitutes a major stretch of the boundary between the two states; its waters fall within Nicaraguan sovereignty, while Costa Rica enjoys rights of navigation on it.[79] At a point close to the Caribbean coast the river divides into two branches. From here, the border runs along the right bank of the north-flowing branch, the Lower San Juan—although until this judgment there was confusion as to whether the border and the river diverged in the very last mile or two. The reason for the confusion was that, due to natural geological modifications over time, the boundary line described in arbitral awards of the 19th century no longer exactly corresponded to the river's flow. Nevertheless, the criterion

[77] Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), para. 229 (Int'l Ct. Justice, Dec. 16, 2015) [hereinafter Certain Activities/ Construction of a Road].
[78] Application Instituting Proceedings (Costa Rica v. Nicaragua), para. 41 (Int'l Ct. Justice, Nov. 18, 2010).
[79] Costa Rica's navigational rights were the subject of a recent judgment: Navigational and Related Rights (Costa Rica v. Nicaragua), 2009 ICJ REP. 213 (July 13).

underlying that boundary line—that it should run along the right bank of the navigable channel of the river—was accepted by both parties. They disagreed, however, as to which channel was indicated: Costa Rica referred to the main river. Nicaragua referred to a channel to the right of the main river, that it claimed to have dredged (beginning in 2010) to *restore* to navigability.[80] Costa Rica contended that Nicaragua had artificially created this channel in Costa Rican territory.

Many of Costa Rica's other claims flowed from this one. For, if the channel dug by Nicaragua was an artificial one, then (Costa Rica alleged) Nicaragua had indeed trespassed upon Costa Rica's territory: it had violated Costa Rica's sovereignty and territorial integrity; used the San Juan River to commit hostile acts (contrary to a specific obligation not to[81]); and, worse, had sent its military into that territory, breaching Article 2(4) of the UN Charter, and making that territory the object of a military occupation. Nicaragua claimed it was merely clearing an existing channel, which was the one that appropriately marked the boundary between the two states; hence no violation of territorial sovereignty or any other obligation was entailed. The Court, therefore, first pronounced upon the territorial dispute. Finding no evidence to support Nicaragua's claim that the channel it was clearing was a natural one, the Court found in favour of Costa Rica's assertion that its boundary line was determined by the right bank of the main river. Hence the disputed territory was Costa Rican; and Nicaragua was in breach of its obligation to respect Costa Rica's sovereignty.

The Court decided not to 'dwell' upon Costa Rica's related submissions: it decided not to examine whether Nicaragua had breached Article 2(4) of the UN Charter, nor to pronounce upon whether Nicaragua's actions constituted a military occupation.[82] It found Costa Rica's claim of the hostile use of the river unsupported by evidence.

Costa Rica had also claimed that Nicaragua's channelling and dredging activities violated applicable environmental law, including the obligations to conduct an EIA, notify and consult with Costa Rica, and not to cause harm to Costa Rica's territory and protected wetlands. The Court observed that 'general international law' now imposes a requirement 'to undertake an [EIA] where there is a risk that the proposed … activity may have a significant adverse

[80] Certain Activities/ Construction of a Road, *supra* note 77, paras. 77-78. Both parties relied upon the same legal authorities: Treaty of Limits between Costa Rica and Nicaragua, Apr. 15, 1858 (entered into force Apr. 26, 1858); Cleveland Award, Washington, Mar. 22, 1888, RIAA Vol. XXVIII, p. 189; and Alexander Awards I-III, San Juan Del Norte, Sep. 30, 1897 - Mar. 22, 1898, RIAA Vol. XXVIII, pp. 224-230.
[81] Art. IX, Treaty of Limits, *id*.
[82] Certain Activities/ Construction of a Road, *supra* note 77, para. 97.

impact in a transboundary context', quoting its judgment in *Pulp Mills* on the point.[83] However, it was satisfied on the facts that Nicaragua's preliminary assessment had not revealed a risk of significant transboundary harm; and thus it was not required to carry out an EIA. Correspondingly, it had not breached its notice and consult obligations.[84] The Court further found Costa Rica's claim of actual environmental harm unsupported by evidence. It did not answer an interesting legal point raised by Nicaragua, which claimed under the terms of the 1888 Cleveland Award, it was entitled to carry out dredging even if this caused some environmental harm to Costa Rica, for this entitlement constituted a *lex specialis* to its general obligations under environmental law. The Court merely noted that there was no reason for it to decide on whether the development of the obligation not to cause transboundary harm had superseded the earlier regime (if indeed it corresponded to Nicaragua's description), for no harm had been proven on the facts.

Dismissing Costa Rica's environmental claims, the Court made two other findings in its favour. First, on evidence not contested by Nicaragua, it found that Nicaraguan officials had breached Costa Rica's navigational rights on two occasions. Second, Nicaragua was in breach of provisional measures indicated in 2011.[85] The Court had asked both parties to refrain from maintaining military, police or civilian personnel in the disputed territory, and from any action that might exacerbate the dispute. Nicaragua had established a military presence and excavated two additional channels in the disputed territory, violating both parts of the order. On a point of principle, the Court also clarified that a judgment on merits was an appropriate place for the Court to assess compliance with provisional measures and to make a finding of responsibility for their breach (Nicaragua had suggested that such a finding would be redundant by this stage).

However, it declined to awards the costs of the further proceeding on provisional measures (leading to an order in 2013[86]) that Costa Rica claimed had resulted directly from Nicaragua's breach. The Court, which has not to this date awarded costs in any proceeding, decided to follow the general rule (in Article 64 of its Statute) that parties should bear their own costs. It

[83] *Id*., para. 104; See Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 ICJ REP. 14, para. 101 (Apr. 20).
[84] Moreover, the Court did not find any breach of notice and consult obligations under specific treaties such as the Ramsar Convention on Wetlands of International Importance, especially as Waterfowl Habitat, Feb. 2, 1971, 996 UNTS 245 (entered into force Dec. 21, 1975).
[85] Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, 2011 ICJ REP. 6 (Mar. 8).
[86] Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Provisional Measures, 2013 ICJ REP. 230 (July 16).

awarded other relief to Costa Rica, in the form of declarations of Nicaragua's violations, and a finding that it was entitled to receive compensation for material damage caused to its territory.[87] The Court asked the two states to negotiate the quantum of compensation amongst themselves, but has also provided for a judicial determination at the request of either, if they are unable to agree within twelve months.[88] It declined to order assurances and guarantees of non-repetition, preferring to maintain its rather sparing recourse to these forms of reparation.

Turning to Nicaragua's claims against Costa Rica: these arose from Costa Rica's construction of a major roadway along the right bank of the San Juan.[89] The construction began in December 2010, and in early 2011, Costa Rica proclaimed a state of emergency on the San Juan border area, in the light of Nicaragua's activities. In response to Nicaragua's claims as to breaches of applicable environmental law, it argued that the emergency exempted it from the obligation to conduct an EIA before beginning the construction. It further argued that it did carry out environmental impact studies during the construction, which fulfilled the requirement. It rejected Nicaragua's further claim that its actions had caused transboundary harm.

The Court offered a rather more elaborate response to Nicaragua's environmental claims than it had to Costa Rica's, although its fact-focused answers once again did not address some interesting legal points. It first found that the construction project did pose a risk of substantial transboundary harm, triggering the obligation to conduct an EIA. Moreover, Costa Rica had not established that it had conducted any preliminary assessment that suggested otherwise.

It then addressed Costa Rica's argument as to the effects of an emergency. Costa Rica had proposed two distinct bases for its claim that an emergency can exempt a State from the requirement to conduct an EIA: first, because international law contains a *renvoi* to domestic law on this point; and second, because international law includes an exemption for emergency situations. On the first, the Court found that its previous pronouncement that it was for each state '"to determine in its domestic legislation or in the authorization process for the project, the specific content of the EIA required in each case" having regard to various

[87] Nicaragua had already withdrawn from the disputed territory in response to the 2013 order. The Court considered that its declaration of Nicaragua's territorial violation provided adequate satisfaction for the non-material injury suffered by Costa Rica.

[88] If the Court does ultimately fix the quantum of compensation, it will mark only the third occasion on which it would have done so; the others were Corfu Channel (UK v. Albania), Compensation, 1949 ICJ REP 244 (Dec. 15); and Diallo (Guinea v DRC), Compensation, 2012 ICJ REP 324 (June 19).

[89] Application Instituting Proceedings (Nicaragua v. Costa Rica), paras. 49-52 (Int'l Ct. Justice, Dec. 22, 2011).

factors', did not extend to the question of whether an EIA should be undertaken.[90] The international obligation to conduct an EIA was not affected by an emergency exception in domestic law. The Court did not address the second point, simply noting that the facts did not indicate the existence of an emergency necessitating the immediate construction of the road.

It further found that Costa Rica's impact studies did notfulfill the obligation to conduct an EIA, for that obligation required an *ex ante* evaluation of the risks of transboundary harm. Costa Rica was thus in breach. The Court did not pronounce on Nicaragua's related claims as to Costa Rica's failure to notify and consult with Nicaragua, perhaps again as a matter of judicial economy.[91] It found that Costa Rica's actions had not caused significant transboundary harm, and dismissed as unfounded a standard of evaluation proposed by Nicaragua -- that any detrimental impact capable of being measured would constitute significant harm.

Finally, the Court also dismissed Nicaragua's claim that Costa Rica's construction had led to the creation of deltas in the river that amounted to 'physical invasions, incursions by Costa Rica into Nicaragua's sovereign territory . . . through the agency of sediment'.[92] It described the 'theory' of territorial infringement via sediment as unconvincing; and in any event unsupported by the facts.[93] Thus, finding in Nicaragua's favour only in respect of the obligation to conduct an EIA, the Court awarded it declaratory relief on this point and dismissed its other requests for reparation.

What, then, to take from the above summary of the facts, arguments and findings in the joined cases? Perhaps most striking is the Court's embrace of judicial economy, particularly in not deciding on Costa Rica's claim of the use of force by Nicaragua. This was a serious allegation, involving, at an extreme, the breach of a peremptory norm. While the Court has long asserted a 'freedom to select the ground upon which it will base its judgement',[94] it is not self-evident that a selection is appropriate between claims that represent rather different orders of responsibility. Selecting a claim involving a lower-order breach seems hardly

[90] Certain Activities/ Construction of a Road, *supra* note 77, para. 157.
[91] The Court did not find a breach of specific notice and consult obligations under the Ramsar Convention, *supra* note 84.
[92] Certain Activities/ Construction of a Road, *supra* note 77, para. 221.
[93] *Id*., para. 223.
[94] The Court first used the phrase in Guardianship of Infants (Netherlands v. Sweden), 1958 ICJ REP. 55, 62 (Nov. 28), but previously employed the approach in Fisheries (UK v. Norway), 1951 ICJ REP. 16 (Dec. 18): Alexander Orakhelashvili, *The International Court and its 'Freedom to Select the Ground upon which it will Base its Judgment'*, 56 INT'L COMP. L.Q. 171, 173 (2007).

sufficient to vindicate the rights of a state that has suffered violation of a peremptory norm.[95] Yet the Court appeared to find it sufficient, for it based its explanation not even on the freedom to select (which, though problematic, is at least unfettered by criteria for application[96]), but on the statement that by its judgment and Nicaragua's consequent evacuation, 'the injury suffered by Costa Rica "will in all events have been sufficiently addressed".'[97] This approach, which the Court has also taken previously,[98] is unsatisfactory. As Judge Robinson argues in a detailed opinion, the Court's judicial function, as a UN organ, is to contribute to the maintenance of international peace and security, by way of peaceful settlement of international disputes.[99] This entails that it must decide all non-frivolous claims of breach of Article 2(4) of the UN Charter that are asserted before it—both to clarify for all states the contours of that provision, regarded as the Charter's 'cornerstone', and to determine the appropriate reparation owed to the injured state.[100] Here, the Court's approach subsumed Nicaragua's breach of Article 2(4) under a lesser infringement, and denied Costa Rica the remedy of satisfaction for that breach.[101]

The Court's decision not to pronounce upon the existence in international law of an emergency exception to the obligation to conduct an EIA is more understandable. For, in this instance, the Court first determined that the factual basis for the claim did not exist (unlike with respect to Costa Rica's claims on Nicaragua's use of force). Further consideration of an emergency exception would have been superfluous, and a pronouncement on its legal status an *obiter dictum*. Nevertheless, we might wish that the Court had made the pronouncement, given the importance of the issue and the paucity of legal writing upon it. Whether states may claim an emergency as the basis for exemption from legal obligations remains an area of uncertainty, on such issues as the scope of the exception, the norms to which it may be applied, the conduct permitted and, most importantly, who decides. The law has consolidated

[95] See also Tom Ruys, *The Meaning of 'Force' and the Boundaries of the Jus Ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?*, 108(2) AJIL 159, 160-163 (2014).
[96] Orakhelashvili, supra note 94, 183.
[97] Certain Activities/ Construction of a Road, *supra* note 77, para. 97.
[98] The Court cited *Land and Maritime Boundary (Cameroon* v. *Nigeria; Equatorial Guinea intervening)*, 2002 ICJ REP. 303, para. 319 (Oct. 10).
[99] Certain Activities/ Construction of a Road, *supra* note 77, Sep. Op. Robinson, J., para 30. On the Court's approach to cases concerning the use of force see Christine Gray, *The International Court of Justice and the Use of Force*, *in* THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 237 (Christian Tams and James Sloan eds., 2013).
[100] Robinson, *id*., paras. 27, 37-38.
[101] *Id*., paras. 37-39.

around specific devices, such as rules on derogations from human rights obligations,[102] and the defence of necessity formulated in the ASR,[103] but it is not clear that such enumerated grounds exhaust the possibilities of invoking an emergency. At its heart, the question engages the perpetual debate on the proper relationship between sovereignty and international order, and the extent to which they accommodate each other. While the Court may not have offered any substantial contribution to this debate, it could have advanced our understanding on the applicability of an emergency exception to environmental obligations.[104] In any event, the judgment confirms two things. First, the existence of an emergency exception in domestic law does not suffice to exempt a state from international legal obligations. And, second, the Court will make its own factual determination as to whether an emergency exists that justifies the measures taken.[105]

Some might choose to contrast the Court's economical approach to arguments on the merits with its more expansive approach to admissibility, for it permitted two submissions by Costa Rica that had not formed part of its original application. One was on Nicaragua's breaches of Costa Rica's rights to navigation; which claim the Court rightly considered could be read into the general language of Costa Rica's requested remedies. The second related to the question of who had sovereignty over the disputed territory, which was raised by Costa Rica only at the stage of the oral argument (but became the subject of the Court's first operative conclusion). Judges Gevorgian and Guillaume argued that the Court should not have decided this issue, with Judge Guillaume in particular suggesting that the Court should have found Costa Rica's submissions on this point inadmissible because they transformed the character of the dispute.[106] However, the Court's own view, that it needed to settle the territorial dispute in order to determine whether Nicaragua had incurred responsibility, is more persuasive. As such then, the Court's approach to admissibility does not present any novel considerations.

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[102] E.g. Art. 4, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (entered into force Mar. 23, 1976).
[103] Art. 25, ASR, *supra* note 13.
[104] In another context the Court has clarified that certain treaty obligations to protect the environment were not obligations of total restraint during military conflict: Legality of Nuclear Weapons, *supra* note 62, para. 30.
[105] The Court has previously asserted that the necessity of measures taken to protect its essential security interests is 'not purely a question for the subjective judgment of the party': Oil Platforms (Iran v. U.S.), 2003 ICJ REP. 161 (Nov. 6), para. 43; Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Merits, 1986 ICJ REP. 14 (June 27), para. 282. In both cases it found the measures unnecessary for the purpose while not directly challenging the United States' determination that its essential interests were threatened (albeit expressing scepticism in the Nicaragua case); in the present case, it appears to doubt Costa Rica's claim of an emergency.
[106] Certain Activities/ Construction of a Road, *supra* note 77, Decl. Guillaume, J. *ad hoc*, para. 16; see also Decl. Gevorgian, J.

But the Court's decision not to award costs to Costa Rica does call for appraisal. And, it has been subjected to a critical one by several members of the Court. Judges Tomka, Greenwood, Sebutinde and Dugard argue in a joint declaration that the relief was merited. Costa Rica had claimed costs only for the proceeding on provisional measures necessitated by Nicaragua's non-compliance with a previous Court order. The Court had found Nicaragua in breach, and the present judgment clarifies that Nicaragua owes compensation to Costa Rica for any damage caused by its breach. It seems incongruous that Costa Rica was then denied the opportunity to recover 'what may well be the largest expense it was obliged to incur, namely the costs of nearly a week of hearings before the Court.'[107] Given these facts, the Court should have appropriately offered an explanation for why costs should not be awarded. Instead, it offered only a rather 'Delphic pronouncement'.[108]

Finally, a word on the obligation to conduct an EIA. The judgment confirms that states do have the obligation where there is a risk of significant transboundary harm, and moreover that it stems from a broader due diligence obligation to prevent such harm. It also confirms, more or less, that the Court will evaluate for itself whether there was a risk of significant harm, based on the materials supplied by the parties: it does so with respect to claims against both parties. However, its standards for evaluation are less clear. In the case against Nicaragua, the Court relies on Nicaragua's own study, which it finds confirmed by the experts produced by both parties. With almost no discussion, it states that it is satisfied that there was no risk of substantial harm. In the case against Costa Rica, in contrast, the judgment offers a more expanded discussion, outlining the considerations and factors that are relevant.[109] The reason for this extended evaluation was perhaps its finding that Costa Rica had not conducted a preliminary risk assessment (which 'is one of the ways in which a state can ascertain … a risk of significant transboundary harm'[110]). But the Court does not clarify if that is indeed its reason for the different treatment of the two claims, and whether that reason grounds a general approach. Nor does it clarify what would amount to a satisfactory preliminary assessment. The whole becomes particularly puzzling if we take on board Judge *ad hoc*

[107] Certain Activities/ Construction of a Road, *supra* note 77, Joint Sep. Op. Tomka, J., Greenwood, J., Sebutinde, J. and Dugard, J. *ad hoc*, para. 7.
[108] *Id*., para. 9.
[109] For a succinct analysis see Diane Desierto, *Evidence but not Empiricism? Environmental Impact Assessments at the International Court of Justice*, EJIL:Talk! (Feb. 26, 2016), at www.ejiltalk.org/evidence-but-not-empiricism-environmental-impact-assessments-at-the-international-court-of-justice-in-certain-activities-carried-out-by-nicaragua-in-the-border-area-costa-rica-v-nicaragua-and-con/.
[110] Certain Activities/ Construction of a Road, *supra* note 77, para. 154.

Dugard's criticisms of Nicaragua's risk assessment.[111] To the extent that those are merited, it does not seem that Nicaragua had satisfactorily evaluated the degree of risk to Costa Rica's environment. Why then is the Court persuaded? The judgment might have done more to clarify matters.

The Court also introduces some uncertainty in relation to the obligation to notify and consult. As Judge Donoghue notes, the judgment uses language that appears to unduly narrow the scope of this obligation in suggesting that it arises only if the EIA confirms a risk of significant transboundary harm.[112] But if the notice and consult obligation is part of a broader due diligence obligation to prevent transboundary harm, then there is no reason why it should not operate vis-à-vis a potential affected state even prior to the assessment of risk.[113] The participation of such a state may well be indispensable for the proper conduct of a risk assessment.

The Court's approach as regards the content of the EIA, however, should be affirmed. It rightly leaves each state to determine this in light of the particular circumstances; stipulating more specific content could have amounted to over-prescription. Instead, a more detailed elaboration of the standards by which a state must determine whether to conduct an EIA in the first place would represent a better, and more modest intervention.

II. CONCLUSION

The judgments covered in this review add to the corpus of international law in incremental rather than fundamental ways. Croatia v. Serbia slightly expands the concept of genocide, elaborates the Court's approach to evaluating evidence and clarifies the inapplicability of the *Monetary Gold* principle to extinct states. Moreover, it has opened the way for further assessment of the concept of state responsibility by succession, which may indeed catalyse doctrinal development. Costa Rica v. Nicaragua settles a territorial dispute, offers some clarification on the obligation to conduct an EIA and confirms that a domestic provision for emergencies cannot on its own qualify a state's international obligations and that the Court will evaluate for itself whether there exists a state of emergency necessitating specific measures. It also confirms the Court's reluctance to grant costs. Bolivia v. Chile did not

[111] *Id*., Sep. Op. Dugard, J. *ad hoc*, paras. 21-35.
[112] *Id*., Sep. Op. Donoghue, J., para. 21.
[113] *Id*., Sep. Op. Donoghue, J., para. 21.

provide occasion even for small pronouncements; the most we might take away is the Court's approach to characterizing the subject-matter of the dispute, and its reluctance to join Chile's preliminary objection to the merits.

The cases are perhaps most noteworthy in revealing the Court's preference for judicial economy. In both Croatia v. Serbia and, especially, Costa Rica v. Nicaragua, the Court preferred first to make factual findings, in order to judge where pronouncements on the legal position were called for. The judgments are remarkable for the legal possibilities that were canvassed but not clarified for the lack of a factual necessity—responsibility by succession, Nicaragua's use of force and the existence of an emergency exception in international law. The Court's approach may be due to its focus 'on deciding the case rather than developing the law';[114] certainly, the judgments determine significant claims (genocide, territorial rights), which must have held the Court's attention. Nevertheless, in other cases the Court has offered more comprehensive discussion and influential *obiter dicta*.[115] The election for judicial economy in the present cases, particularly where this entailed an abortive discussion of an unestablished doctrine (succession to responsibility), or omission to decide a claim of use of force, is thus not easily explained. Moreover, the Court also skated lightly over points upon which did not involve concerns of judicial economy, such as the criteria for evaluating the conduct of a preliminary risk assessment, criteria for giving weight to scientific evidence in relation to the finding of environmental risks and the basis for the decision not to award costs. Here, the Court's omissions make it difficult to understand the reasons underlying its findings, which could impact their reception.[116] They also deny states valuable guidance as to appropriate standards of conduct (such as in conducting a preliminary risk assessment).

In contrast, there are two aspects of the judgments which promote rather than constraining opportunities for a reasoned debate. Firstly, the Court's generous approach to admissibility, allowing new arguments even at late stages (so long as they do not transform the character of the dispute), may be justified as ensuring that state parties have the chance to articulate all arguments in support of their positions. Secondly, the numerous separate opinions—by which individual judges may not only offer fuller explanations of the judgments, but may also serve as the Court's interlocutors over time. Noteworthy examples of the latter role include Judge

[114] Franklin Berman, *The International Court of Justice as an Agent of Legal Development, in* DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 99, at 7, 12.
[115] Famously, Barcelona Traction (Belgium v. Spain), Second Phase, 1970 ICJ REP. 3, paras. 33-34 (Feb. 5).
[116] See however Christian Tams, *The ICJ as a 'Law-Formative Agency': Summary and Synthesis, in* DEVELOPMENT OF INTERNATIONAL LAW, supra note 99, at 377, 390-391.

Donoghue querying whether in Croatia v. Serbia the Court had faithfully applied its own stated standard of proof, Judge Tomka raising questions about its embrace of the succession thesis, Judge Gaja encouraging it to adopt a different standard for state responsibility for genocide than that applied to individual criminal responsibility, Judge Robinson's elaborate discussion of its duty to pronounce upon violations of Article 2(4) of the UN Charter, Judge *ad hoc* Dugard's dissection of its assessment of Costa Rica and Nicaragua's conduct in relation to their obligations to undertake EIAs, and his joint opinion with Judges Tomka, Greenwood, and Sebutinde, challenging the Court's decision not to award costs to Costa Rica and calling attention to its failure to give reasons. Although commentators differ as to the proper role of separate opinions—with some cautioning against 'judicial overkill' resulting from too-inventive opinions—it is understood that they provide means for checking anomalies and elisions in the Court's reasoning, and may nudge the development of international law in particular directions.[117] The opinions mentioned above are all careful critiques of the Court's judgments, which both highlight points for further consideration by scholars and may push the Court towards a more thorough discussion when a further opportunity arises.

[117] Berman, *supra* note 114, 12-13; see also Robert Jennings, *The Role of the International Court of Justice*, 1998 BRIT. Y.B. INT'L L. 1, 28-30. See further Gleider Hernández, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 95-125 (2014).